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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

## No. 72-322

The Steam Vessel FLYING FOAM, her engines, boilers, tackle, apparel, etc., and AMERICAN EXPORT LINES, INC.,

*Petitioners,*

—against—

IRON ORE TRANSPORT CO., LTD., as Owner of the Steam Vessel RUTH LAKE,

*Respondent.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### QUESTION

Should *certiorari* be granted in this case when:

1. The District Court found factually that both vessels were guilty of major faults which contributed to the collision, which findings of fact were affirmed *per curiam* by the Court of Appeals for the Fourth Circuit.

2. The primary reason for granting the writ advanced by petitioners is that the case is similar to *Union Oil Co. of California* v. *Tugboat San Jacinto* (in which *certiorari* was granted, No. 71-900).

3. *Certiorari* was granted in the Union Oil case to resolve a conflict between Circuits as to the application of the half distance rule for determining moderate speed in reduced visibility.

4. This case does not depend on the application of the half distance rule for the establishment of major faults on petitioner's vessel, the FLYING FOAM.

5. This case does not involve any special or unusual features warranting *certiorari.*

## STATEMENT OF THE CASE

The case results from a collision between two vessels, one – the RUTH LAKE – outbound from the Virginia Capes, and the other – the FLYING FOAM – inbound. The trial court found both vessels guilty of major faults contributing to the collision and divided the damages equally. The Court of Appeals affirmed *per curiam.*

Petitioner now seeks a writ on the contention that there are two elements in this case which are also present in *Union Oil Co. of California* v. *Tugboat San Jacinto*, 304 F. Supp. 519 (Or. 1969), mod'd. 451 F. 2d 1369 (9 Cir. 1971), cert. granted, 405 U.S. 954 (1972), in which *certiorari* has been granted. In *Union Oil*, the trial court held the tugboat SAN JACINTO solely at fault because she failed to see the tanker, SANTA MARIA, and changed course right across her bow. (This is similar to the action of the petitioner's vessel, the FLYING FOAM, in this case in that she changed course across the bow of the RUTH LAKE.) The Court of Appeals reversed, agreeing that the SAN JACINTO was at fault, but also finding the tanker at fault for proceeding through or in vicinity of fog at a speed greater than that at which she could stop within one-half of her visibility. Thus the half-distance rule enunciated in *The Silver Palm*, 94 F. 2d 754, 757 (CCA9, 1937) was involved. Because both vessels by necessity were held at fault, the long established admiralty doctrine of an equal division of damages in mutual fault cases was also invoked.

The decision in *Union Oil* pointed up a conflict between two Circuits on the half-distance rule, because the Fifth Circuit recently ruled in *Hess Shipping Co.* v. *SS Charles Lykes*, 417 F. 2d 346 (5th Cir. 1969) that "moderate speed" as required by the Rules was a relative concept and should not be restricted to the rigid framework of a stopping distance which does not exceed one-half the visibility.

The granting of *certiorari* in *Union Oil* to resolve the inter-circuit conflict in interpreting the application of the half-distance rule, is not a basis for granting *certiorari* in this case because the violation of the half-distance rule is only one of several major faults committed by the petitioner's vessel, FLYING FOAM.

The collision in this case occurred at Cape Henry, Virginia, one-half a mile south of the Chesapeake Bay entrance Buoy 2CB at 0246 (2:46 A.M., E.D.T.), on May 7, 1967. Buoy 2CB "is known as the Chesapeake Bay approach buoy as it marks the focal point for all deep draft vessels entering or leaving Chesapeake Bay or Hampton Roads. It is the 'Times Square of the South' and is acknowledged to be located in the area of heavy water traffic." (p. 18a)* The accident happened when the inbound steam vessel FLYING FOAM, without any signal, turned across the outbound shipping lane in front of the RUTH LAKE. In holding both vessels guilty of major faults that contributed to the collision, the trial judge, Walter E. Hoffman, said:

> "We have no difficulty in condemning both vessels under the circumstances of this case." (p. 13a)
>
> "While the RUTH LAKE argues that the FLYING FOAM is solely at fault by reason of the order to go hard right to pass Buoy 2CB to port, we cannot agree that this was the only major fault involved." (p. 16a)
>
> "Equally at fault was the FLYING FOAM with no operative radar and no knowledge as to her whereabouts until 0242 – 4 minutes prior to collision – when she

*Page numbers followed by the letter "a" are references to the corresponding page in the *Appendix* to the *Petition for Writ of Certiorari*.

sighted 2CB 'a mile or so dead ahead' or perhaps only one quarter of a mile as estimated by the lookout. It was at this point that the FLYING FOAM altered her course to starboard in order to pass the buoy to port." (p. 16a)

"However, with respect to the RUTH LAKE and FLYING FOAM, we see no element of closeness. *Both vessels were guilty of major faults.* (Emphasis added.) (p. 17a)

The trial and appellate courts have made factual findings that both vessels were guilty of major faults that contributed to the collision. The petition for *certiorari* is simply another effort to change that factual determination. There are no special or unusual issues of this case to support a favorable consideration of the *Petition for Writ of Certiorari.*

## FACTS

A simple, chronological statement of events will demonstrate that this is a classic case of what the courts have declared it to be - a collision resulting from the mutual faults of two vessels.

The RUTH LAKE discharged her pilot at 0203 on May 7, 1967 and headed to sea. After a short time she sighted the white lights of a vessel ahead, about six miles away and two points off her starboard bow. Four to five minutes later the lights were again sighted, at about 3 miles, with the bearing opening, indicating a safe starboard to starboard passage. Shortly thereafter, the aspect of the lights changed and a red light was seen, indicating a course change by the incoming FLYING FOAM. The RUTH LAKE immediately put her rudder to starboard and her engines full astern. Nevertheless, she was caused to collide with the port side of the FLYING FOAM.

The FLYING FOAM was inbound from Puerto Rico. She passed False Cape Buoy at 0136 and set her course at 341° to stay to seaward of Buoy 2CB – about one hour away. At

0215 she came right slightly to 345°, expecting to encounter Buoy 2CB at 0230. When that time arrived and Buoy 2CB had not been sighted, she started her fog signals. At 0232 she slowed from sea speed, 17 knots, to full ahead maneuvering speed, 12 knots. At 0237 the Buoy had not been sighted. She kept apace, but ordered a Radio Direction Finder Fix. Five minutes later, at 0242, she observed Buoy 2CB one mile away and to starboard and abruptly changed course 20° to starboard without giving a signal so that she would pass to seaward of the Buoy and line up in the inbound shipping lane. About 3 minutes later, at 0245, she sighted the RUTH LAKE, ordered her engines full ahead then emergency full ahead. Nevertheless, the collision occurred in about 1 minute, at 0246.

The chronology, along with Exhibits 21* and 22,* clearly show that the outbound RUTH LAKE proceeded so that she would pass Buoy 2CB to port. On two occasions, at six miles and again at three miles, she sighted the lights of the FLYING FOAM off her starboard bow and determined the position of the FLYING FOAM to be such that the two vessels would pass starboard to starboard. Accordingly, no action was required of the RUTH LAKE excpet to hold her course. *City of Albany*, 34 Fed. 812 (1888). Until the red light of the FLYING FOAM was sighted, there was every indication that the vessels would pass each other safely. When the FLYING FOAM changed her course, and came across the outbound shipping lane, it was too late for the RUTH LAKE to avoid her.

In contrast, the FLYING FOAM approached a busy, marine intersection without knowing her position. She was searching for Buoy 2CB. When she did not reach the intersection buoy at the expected time, about 0230, the crew wondered about the visibility and started fog signals. The master ordered a Radio Direction Finder Fix but never got it. Instead, he sighted the buoy visually a little more than a mile ahead and changed his course some 20° to starboard so as to leave the buoy on her port side. Up to this point, the FLYING FOAM had failed to sight the RUTH LAKE – which had sighted her

*See pages 13 & 14

twice. This unexplained failure to see what should have been seen is conclusive evidence of a statutory fault. *New York*, 175 U.S. 187, 204 (1899). The master of the FLYING FOAM realized that he had a defective radar and was without a fathometer and that, "I was coming into restricted waters. By 'restricted' I mean where there's a lot of traffic." However, he failed to take reasonable precautions to avoid collision.

On these facts the District Judge found both vessels guilty of major faults. He condemned the FLYING FOAM for "no operative radar and no knowledge of her whereabouts," for failing to see the RUTH LAKE, for excessive speed, and for failure to sound a whistle signal. The RUTH LAKE was found at fault for an inadequate lookout, excessive speed, and failure properly to use her radar.

This is a classic mutual fault case having no features which would warrant a *writ of certiorari*.

I

**The Admiralty Rule of Dividing Damages Equally Between the Two Vessels Found at Fault for a Collision is Eminently Sensible and Should Not be Disturbed.**

Collisions between two vessels result from:

A. Inevitable accident.

B. The fault of one vessel – the other being free of fault, or

C. The joint fault of two vessels.

In this case the trial court and the Court of Appeals have found that each of the two vessels was guilty of major faults contributing to the collision. Neither vessel should be permitted to re-argue its case in an effort to mitigate the factual findings of fault.

Petitioner would have this Court set aside the long standing admiralty rule which has equally divided the damages

in such cases where the two vessels have each been guilty of a major fault. Instead, petitioner would place upon the Court the burden of apportioning damages on the basis of some hypothetical percentages. If one vessel is going too fast and another vessel fails to maintain a proper lookout, each one has committed a fault which has substantially contributed to the collision. Who is to say which is the greater fault? It is difficult enough to reproduce at the trial the actual occurrence of a collision with sufficient detail and fidelity to permit the trial judge properly to assess fault. It would be even more difficult to try to assess a percentage of responsibility for a particular fault. Because this is the sensible and practical basis of the divided damage rule, it has been followed by the American Admiralty Courts since 1855. *Schooner Catherine* v. *Dickinson,* 58 U.S. (17 How.) 170, 15 L. Ed. 233 (1855).

There may be reason to deny an equal division of damage when one vessel has been flagrantly negligent and the other vessel has committed only a minor fault. This is the basis of the major-minor fault rule. The experienced trial judge rejected application of the rule in this case, saying:

> "We do not believe that the major-minor fault rule as enunciated in the City of New York, 147 U.S. 72, 85 (1893), can be invoked by either vessel. As indicated by THE VICTORY & THE PLYMOTHIAN, 168 U.S. 410, 414 (1897), the determination of this issue is frequently a close question because subsequent knowledge of what might have prevented disaster tends to quality the inquiry as to the prior duty to avert it. However, with respect to the RUTH LAKE and FLYING FOAM, we see no element of closeness. Both vessels were guilty of major faults." (p. 17a)

If it is found that both vessels are guilty of major faults that contributed to the collision, there is no reason to apply any speculative proportionate damage rule, and this Court has consistently denied *certiorari* in such cases. See:

*In re Adams Petition* (Melrose - Sandcraft), 237 F. 2d 884, 887 (2 Cir. 1956), cert. den. 352 U.S. 971, 1 L. Ed. 2d 325 (1956).

*The A.C. Dodge*, 234 F. 2d 374 (2 Cir. 1956), Cert. den. 352 U.S. 928, 1 L. Ed. 2d 163 (1956).

*National Bulk Carriers, Inc.* v. *United States*, 183 F. 2d 405, 410 (2 Cir. 1950), cert. den. 340 U.S. 865, 95 L. Ed. 631 (1950).

## II

## There is No Merit in Petitioner's Second and Third Points.

### (a)

### The FLYING FOAM Should Have Signaled Her Turn.

According to Rule 28, 33 U.S.C. 1090(a), vessels in sight of one another should indicate a course change by giving whistle signals. Even though the FLYING FOAM could have, or in the exercise of reasonable diligence should have, "observed visually" the approaching RUTH LAKE, it is contended in this court that she was not obligated to give the signal required by Rule 28.

The RUTH LAKE lookout observed the FLYING FOAM at a distance of six miles and again at three miles. On the other hand, the lookout of the FLYING FOAM did not see the RUTH LAKE until 2CB was sighted. While the lookout of the RUTH LAKE was effectively carrying out his duties, the lookout on the FLYING FOAM was totally ineffective. He did not sight the RUTH LAKE until she was sighted by the master on the bridge. And when she finally was sighted, the RUTH LAKE was only one-quarter of a mile from the FLYING FOAM. This completely negates the FLYING FOAM's contention that it was not necessary to give a signal of the course change because the RUTH LAKE was not in sight.

**(b)**

**As the Burdened Vessel, the FLYING FOAM was Required to Hold Her Course.**

The FLYING FOAM charges the RUTH LAKE with being a burdened vessel in a crossing situation. If the RUTH LAKE was burdened, then the FLYING FOAM was the holding-on vessel and she could not under the rules change her course from 345° to 005°. Rule 21, 33 U.S.C. 1083. When she changed her course without sounding a whistle, she committed a statutory fault. As explained in *Griffin on Collision*, at page 145:

> "Violation by the holding-on vessel of the requirements of Article 21 is, of course, a statutory fault and throws upon her the burden of showing that 'the fault she committed could not have been one of the causes of the collision'." (Citing authorities.)

Furthermore, if a change in course to starboard was required, the RUTH LAKE is condemned for not sounding one blast. *Griffin on Collision* states:

> "If the time has come at which the holding vessel is obliged to act under the note in Article 21, a change of course is certainly then authorized by the rules, and, if to starboard, is to be announced by a signal of one blast." (p. 123.)

In considering the point, the trial judge concluded:

> "We know, of course, that the 'visible distance' rule of 'moderate speed' should not be applied blindly, but where there is knowledge, either actual or constructive, of the presence of other vessels in the vicinity - actual knowledge of the RUTH LAKE and constructive knowledge of the FLYING FOAM - with the limited visibility here shown, the speed may well be immoderate regardless of whether the 'visible distance' test of moderate speed is applicable or not. *Gertrude Parker, Inc.* v. *Abrams*, 178 F. 2d 259, 264 (1 Cir. 1949)." (p. 18a)

III

**The Speed of the Vessels Was More a Condition Than a Cause of the Collision.**

Although the FLYING FOAM attaches great significance to the speed of the RUTH LAKE, the speed of either vessel is more a condition than a cause of the collision. Both vessels were traveling at substantially the same speed, the FLYING FOAM having continued at full maneuvering speed even after sighting Buoy 2CB. After the course change which brought about the collision, neither vessel could have stopped short of the point of impact.

The efficient cause of the collision was the FLYING FOAM's 20° course change from 345° to 005°; and the course change across a major shipping lane was the result of the FLYING FOAM proceeding rapidly and blindly into an area of heavy traffic without knowledge of her position. Up until the moment the FLYING FOAM altered course, as Exhibit 22* clearly shows, the two vessels were meeting one another in a situation where the RUTH LAKE would cross nearly a mile ahead of the FLYING FOAM. At the closest point, when the two vessels were abeam of each other, they would be some 300 to 400 yards apart. This is what the captain of the RUTH LAKE contemplated from his radar observations; and it is what actually would have happened had it not been for the course change of 0242.

The arguments advanced by the FLYING FOAM are concerned less with the real causes of the collision than with specious interpretations of the law and a convoluted analysis of the facts. This is well illustrated by the contention that a vessel with radar must go slower than one without radar. This is nonsense. The presence of radar may enable a vessel to proceed in weather when a vessel without radar must heave to. All that the Radar Rules (Annex to Rules (2) ) mean is that where two vessels are proceeding cautiously, the one with radar may see a situation to which the other is oblivious and thereby take

*See page 14

precautions which the other would not. But to argue that a vessel armed with radar's superior sight must travel slower than one without it, does not make sense.

The major-minor fault doctrine is not applicable, nor would proportionate fault be appropriate, when both vessels are found to have committed major errors that contribute to the collision.

## CONCLUSION

The experienced District Judge found that the FLYING FOAM and the RUTH LAKE committed major faults that contributed to the collision. The findings were affirmed *per curiam* by the Fourth Circuit. There is no reason for lifting the decisions with respect to the FLYING FOAM. Her efforts were bent toward finding Buoy 2CB, not other vessels. If she had not changed course, there would have been no collision, and, even under her theory of the case, she was bound under the rules not to make that course change. No reason has been shown to reverse the finding of fault of the District Judge with respect to the FLYING FOAM nor does this case involve any special or important reasons for granting *certiorari*. Accordingly, the petition for *writ of certiorari* should be denied.

Respectfully submitted,

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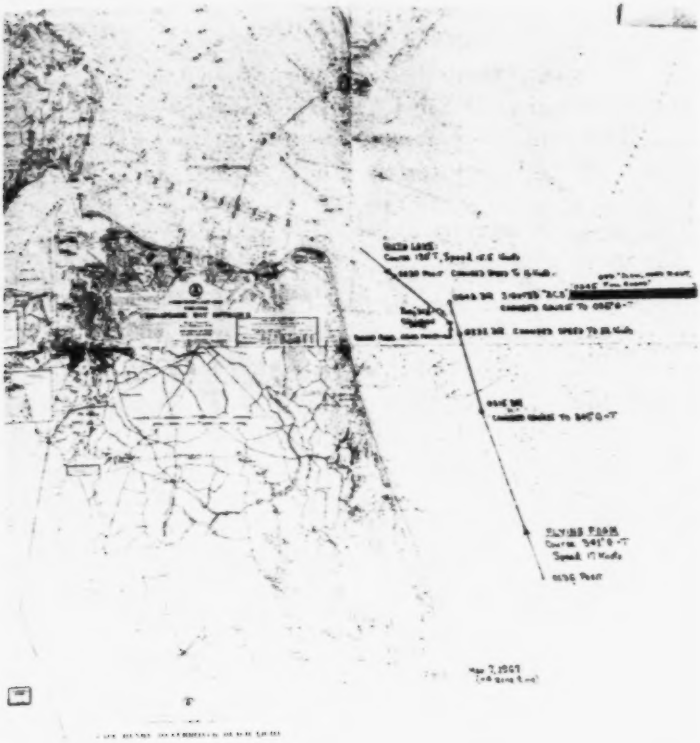

**EXHIBIT 21**

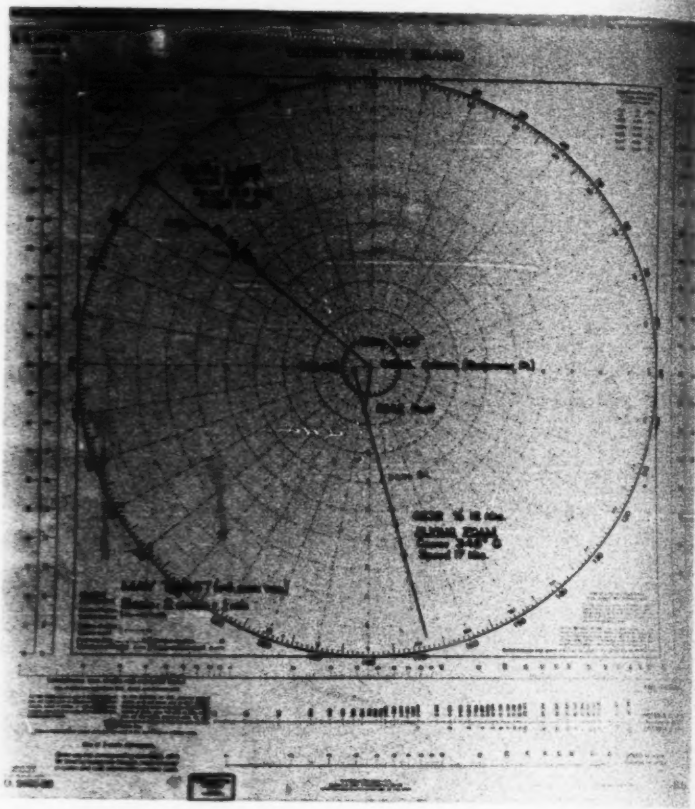

**EXHIBIT 22**